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No. 94-514

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL E. GAUDIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in a prosecution under 18 U.S.C. 1001 for making false statements in a matter within the jurisdiction of a federal agency, the materiality of those statements is an issue to be decided by the court rather than the jury.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-50a) is reported at 28 F.3d 943. The panel opinion of the court of appeals (Pet. App. 51a-62a) is reported at 997 F.2d 1267.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1994. The petition for a writ of certiorari was filed on September 19, 1994, and was

granted on January 6, 1995 (J.A. 39). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1001 of Title 18 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

After a jury trial in the United States District Court for the District of Montana, respondent was convicted on one count of equity skimming, in violation of 12 U.S.C. 1709-2, and 43 counts of making false statements, in violation of 18 U.S.C. 1001.[1] He was sentenced to 36 months' imprisonment on the equity skimming count and to concurrent ten-month terms of imprisonment on each of the 43 false statement counts, to be followed by three years' supervised release. He was also fined $2,200. A panel of the United States Court of Appeals for the Ninth Circuit affirmed the equity skimming conviction, but reversed the false statement convictions. Pet. App.

[1] Of the 45 counts charging false statements under 18 U.S.C. 1001, one count was dismissed before the case went to the jury, and another was dismissed at sentencing.

51a-62a. The Ninth Circuit granted the government's suggestion of rehearing en banc, and the en banc court, like the panel, affirmed respondent's equity skimming conviction but reversed his false statement convictions. *Id.* at 1a-50a.

1. Respondent was a real estate broker and developer who purchased rental housing, renovated it, and purported to sell it to buyers who took out loans insured by the Federal Housing Administration (FHA), an entity within the Department of Housing and Urban Development (HUD). The sales were fraudulent in two ways. First, respondent obtained inflated appraisals of the housing in order to increase the loans supplied by the lending institutions. Second, the buyers had no intention of actually owning the properties; they were "strawbuyers"—friends and relatives of respondent recruited to pose as real buyers. Respondent agreed to repurchase the properties from the strawbuyers at a $1,000 profit to them. In addition, he routinely refunded the down payments they made. Pet. App. 3a. After reacquiring the properties, respondent defaulted on 29 federally insured loans. Respondent made a profit of $982,003 from his scheme. *Id.* at 54a.

Counts 44 through 46 of the indictment charged that respondent violated 18 U.S.C. 1001 by causing false statements to be made on HUD/FHA form 92800-5. On that form, one of respondent's co-defendants certified the appraised value of the property securing the loan. The government's theory was that the statements were false because the appraisals were inflated.

Counts 2 through 17 and 19 through 42 charged that respondent violated Section 1001 by making false

statements on HUD/FHA form HUD-1. The HUD-1 form was the settlement statement used in closing the sales of the rental properties by respondent to strawbuyers. The purpose of the HUD-1 form is to show the source and recipient of the funds changing hands at settlement. The HUD-1 form thus requires a statement of the purchase price, the loan amount, and the closing costs to be paid or received by the seller and the buyer (called the "borrower" on the form). The portion of the HUD-1 form on which respondent was charged with making false statements was line 303, which is at the bottom of the first page of the form.[2] Line 303 is under a caption that says "cash at settlement from or to borrower"; line 303 itself consists of boxes to be checked indicating whether the borrower is to pay or receive money and a blank space to indicate how much. Pet. App. 3a-4a.

On the HUD-1 forms for three of respondent's transactions, the box "to" the borrower was checked; in one transaction, no box was checked; and in the rest, the box "from" the borrower was checked. Various amounts of money were entered on the blank spaces on line 303, ranging from relatively small amounts to several thousand dollars. On each form, respondent signed a certification that, "to the best of my knowledge and belief, [the HUD-1 form] is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction." In all cases, however, the forms were false, because it was respondent, and not the borrower strawbuyer, who actually paid or received

[2] An example of that form is reproduced as an appendix to the court of appeals' en banc opinion. Pet. App. 24a-25a.

the cash amounts recorded on line 303. Pet. App. 4a-5a.

2. The district court instructed the jury that, to convict respondent on the false statement counts, the government was required to prove six elements: (1) respondent made or caused to be made a writing that contained a statement concerning a matter within HUD's jurisdiction; (2) the writing contained false, fictitious, and fraudulent statements; (3) respondent knew or should have known that the statement fell within HUD's jurisdiction; (4) respondent knew that the writing contained false, fictitious, and fraudulent statements; (5) respondent acted with the intent to influence HUD; and (6) the statements were material to the activities or decisions of HUD. J.A. 22-23, 27-28. With respect to the sixth element, the court instructed the jury that the statements charged in the indictment as false were material as a matter of law. J.A. 24, 29; see Pet. App. 5a, 58a.[3] Respondent did not object to that instruction. *Id.* at 19a. The jury convicted him of the Section 1001 charges. *Id.* at 2a.

3. A panel of the court of appeals reversed the false statement convictions. Pet. App. 51a-62a. It held that, under *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979), materiality in a Section

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[3] The jury was instructed as follows: "With reference to the sixth element, I instruct you that the making of a false statement to an agency of the United States Government is not an offense unless the statement made is a material statement. The issue of materiality, however, is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements." J.A. 24, 29.

1001 prosecution must be decided by the jury. Pet. App. 57a-58a. It further held that the error was plain—and therefore could be raised for the first time on appeal—and was not harmless—and therefore required reversal of the convictions. *Id.* at 58a-62a.

4. On rehearing en banc, the Ninth Circuit, in a 6-5 ruling, reaffirmed its holding that materiality under Section 1001 is an issue to be decided by the jury. Pet. App. 1a-50a.

a. The majority noted that virtually every court that has addressed the issue has held that materiality under perjury and false statement statutes is a question of law for determination by the judge. Pet. App. 5a. Those decisions, the court observed, generally rely on *Sinclair* v. *United States*, 279 U.S. 263 (1929), which held that, in a prosecution for failing to answer a question "pertinent to the question under inquiry [by Congress]," the issue of pertinency is a legal issue for determination by the court. *Id.* at 299. The court of appeals concluded, however, that *Sinclair* does not compel the view that materiality in a Section 1001 prosecution is an issue for the court, because more recent decisions establish that the Constitution entitles a defendant to a jury determination, beyond a reasonable doubt, of the facts required to establish the elements of a crime. Pet. App. 6a-9a (citing, *inter alia*, *In re Winship*, 397 U.S. 358, 364 (1970); *Cabana* v. *Bullock*, 474 U.S. 376, 384-385 (1986); and *Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 2082 (1993)). The court concluded that the proper decisionmaker on the issue of materiality must be determined in light of those constitutional considerations. Pet. App. 9a-14a.

The court then held that materiality is "an essential element of the offense prohibited by 18 U.S.C. § 1001,"

because the statute itself makes materiality an element of the crime. Pet. App. 11a. The court further held that, under the prevailing test for materiality—whether a statement "has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed" (*Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (internal quotation marks omitted))—"[i]t would seem that a factual inquiry would nearly always be necessary to determine what makes a difference to the decisionmaking body." Pet. App. 12a. While statutes or regulations could define what is material, the court believed that, in the usual case, materiality is a "mixed question of law and fact." *Ibid.*[4] The court concluded that if materiality is a mixed question of law and fact under Section 1001, "it must be submitted to the jury" under the Sixth Amendment. *Id.* at 13a, 14a. The court added that, "[a]lthough we are confronted in this case with only the issue of whether materiality must be submitted to the jury in section 1001 cases, it seems to be courting constitutional error to withdraw the materiality question from the jury in other perjury and false statement cases." *Id.* at 14a.

The court of appeals recognized that this Court held in *Kungys* that materiality is a question of law to be resolved by the court, and that *Kungys* had

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[4] The court stated, for example, that there were factual issues as to the materiality to the FHA of the misstatements on respondent's settlement statements (*i.e.*, HUD-1 forms). Later in its opinion, the court detailed why it thought that testimony of officials would be necessary to determine whether the misstatements on the settlement statements would have tended to influence any agency decision. Pet. App. 12a-14a.

relied on Section 1001 cases in reaching that conclusion. But the court distinguished *Kungys* as a denaturalization case, not a criminal case. According to the court of appeals, *Kungys* therefore did not have to address the constitutional issue under *Winship* of whether a court could determine an element of the crime as a matter of law. Pet. App. 14a-17a.

Finally, the court held that the error of failing to submit materiality to the jury is neither harmless nor barred from appellate review in this case by the plain error doctrine. Pet. App. 18a-22a.[5]

b. Judge Kozinski, writing for himself and four other judges, dissented. Pet. App. 26a-50a. He noted that, by holding that materiality is an issue for the jury in a prosecution under Section 1001, the court had "provoke[d] a conflict with every other regional circuit." *Id.* at 26a. He also criticized the majority for departing from the Court's holdings in *Sinclair* and *Kungys*, which he said are "directly on point." *Id.* at 28a. Finally, he explained that the majority had misinterpreted Section 1001 in holding that the issue of materiality depends on what facts actually would be considered by a decisionmaking body. *Id.* at 40a-43a.[6]

SUMMARY OF ARGUMENT

I. This Court's decisions and historical practice establish that the issue of materiality in a false statement prosecution under 18 U.S.C. 1001 is a question of law for the court, rather than an issue of fact for

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[5] The court of appeals' holdings on plain error and harmless error are not at issue here.

[6] Judge Kozinski also disagreed with the majority that the error in this case met the requirements of the plain error doctrine. Pet. App. 26a, 43a-47a.

the jury. In *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929), the Court observed that "the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court," and relied on that observation to reject the defendant's argument that, in a prosecution for an offense analogous to perjury, the issue of "pertinency" must be decided by the jury. In *Kungys* v. *United States*, 485 U.S. 759, 772 (1988), the Court similarly relied on the historical treatment of "materiality" in holding that, under the statute authorizing denaturalization for false statements made in applying for citizenship, the materiality of those statements is an issue of law for the court. The decisions in *Sinclair* and *Kungys* are consistent with a vast body of law, both in England and in this country, that has treated the issue of materiality as a legal matter for decision by the court.

Section 1001, like the statutes at issue in *Sinclair* and *Kungys*, proscribes an offense that is analogous to perjury; it punishes the intentional misrepresentation or concealment of facts that have the capacity to corrupt governmental processes. In accordance with *Sinclair*, *Kungys*, and the historical treatment of materiality in perjury prosecutions, Section 1001 is properly understood to treat the determination of materiality as a legal issue for the court.

II. The determination of materiality by the court as an issue of law is consistent with the requirements of the Constitution. Because the traditions in England and this country overwhelmingly endorse the assignment of the materiality determination to the court rather than the jury, there is a strong presumption that that practice is constitutional.

The court of appeals erred in holding that the determination of materiality by the court under Section 1001 violates the right recognized in *In re Winship*, 397 U.S. 358 (1970), to a jury determination of the facts constituting an offense beyond a reasonable doubt. The *Winship* principle is no novelty, but was well established at the time of the decision in *Sinclair*. And, although the defendant in *Sinclair* relied on that principle, the Court found it entirely valid to have materiality issues resolved by the court as "question[s] of law," 279 U.S. at 298. The same analysis holds true today: Because the *Winship* principle applies only to the *facts* necessary to constitute a criminal offense, it is inapplicable to the issue of materiality, which presents a question of *law* for decision by the court.

Nor does it violate any other principle of fundamental fairness to entrust the resolution of materiality issues to the court. The court of appeals' view that the determination of materiality is a classic jury question rests on a misunderstanding of the materiality requirement. Properly understood, that requirement focuses on the nature of the functions that the agency is authorized to perform, and the capacity of the misstatement to affect those functions. Those issues present legal questions. In addition, the court of appeals erred in stating that a question of law cannot involve the assessment of any facts whatsoever. To the extent that materiality requires consideration of facts, it is no different from other legal issues—for example, the admissibility of evidence—that are entrusted to the court and often require the assessment of facts. Finally, the court of appeals erred in attaching significance to the jury's ability to determine more complex questions than issues of

materiality. It is not the complexity, but the nature, of the issue that determines whether it is decided by the court or the jury. As this Court recently reaffirmed in *Kungys*, materiality is a legal issue, and the court may therefore determine it in a prosecution under Section 1001 without depriving the defendant of his right to a trial by jury.

ARGUMENT

THE MATERIALITY OF A FALSE STATEMENT UNDER 18 U.S.C. 1001 IS DETERMINED BY THE COURT RATHER THAN THE JURY

Section 1001 of Title 18 proscribes the making of "any false, fictitious or fraudulent statements or representations" in any matter within the jurisdiction of a federal department or agency. Like the first clause of Section 1001, which prohibits the concealment or covering up of information and is expressly limited to "material fact[s]," the false statement provision has long been interpreted to contain an implicit requirement of materiality.[7] Against the background

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[7] See, *e.g.*, *United States* v. *Corsino*, 812 F.2d 26, 30 (1st Cir. 1987); *United States* v. *Lichenstein*, 610 F.2d 1272, 1278 (5th Cir.), cert. denied, 447 U.S. 907 (1980); *Paritem Singh Poonian* v. *United States*, 294 F.2d 74, 75 (9th Cir. 1961); *Freidus* v. *United States*, 223 F.2d 598, 601 (D.C. Cir. 1955) ("The legislative purpose strongly implies that only material false statements were contemplated, *i. e.*, statements that could affect or influence the exercise of a governmental function."). That interpretation of Section 1001 accords with this Court's treatment of similar language in 8 U.S.C. 1451(a) in *Kungys* v. *United States*, 485 U.S. 759, 767 (1988) (implying a materiality requirement into the misrepresentation provision governing denaturalization, based in part on the express materiality requirement in conceal-

of this Court's decisions and the historical treatment of materiality in perjury statutes, the materiality element of Section 1001 is properly resolved by the court as an issue of law.

I. MATERIALITY IS DETERMINED BY THE COURT AS A MATTER OF PRECEDENT AND HISTORY

This Court has twice addressed the materiality element of statutes that punished misrepresentations that could corrupt governmental processes. See *Sinclair* v. *United States*, 279 U.S. 263 (1929); *Kungys* v. *United States*, 485 U.S. 759 (1988). Like this case, *Sinclair* and *Kungys* presented the issue whether the determination of materiality was a question of law, to be decided by the court, or was instead a question of fact, to be decided by the jury (or the court as trier of fact). In both cases, the Court held that materiality was a question of law for the court. That conclusion reflects the judgment of history, and it is equally applicable to Section 1001.

A. *Sinclair* And *Kungys* Establish That Materiality Is Determined By The Court

1. In *Sinclair*, the defendant was charged under Rev. Stat. § 102 (2 U.S.C. 192). Section 102 made it a crime to refuse to answer "any question pertinent to the question under inquiry" by a congressional

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ment clause); *id.* at 784 n.1 (Stevens, J., concurring). The Second Circuit, unlike the other circuits, does not consider materiality to be an element of the false statement offense created by the second clause of Section 1001, see *United States* v. *Elkin*, 731 F.2d 1005, 1009, cert. denied, 469 U.S. 822 (1984); *United States* v. *Silver*, 235 F.2d 375, 377-378, cert. denied, 352 U.S. 880 (1956), but it has held that the materiality of a fact under the cover-up clause of Section 1001 is determined by the court, see *Elkin*, 731 F.2d at 1009.

committee. 279 U.S. at 284-285. The trial court held that pertinency under Section 102 was a question of law to be decided by the court rather than a question of fact to be decided by the jury.[8] On appeal, the court of appeals certified to this Court the question whether pertinency under Section 102 was "a mixed question of law and fact for the determination of the Court and Jury, or was it solely a question of law?" [9]

This Court held that "[t]he question of pertinency under § 102 was rightly decided by the court as one of law." *Sinclair*, 279 U.S. at 298. The Court drew an analogy between the question of pertinency under Section 102 and two other determinations. First, pertinency "may be likened to [questions] concerning relevancy at the trial of issues in court." *Ibid.* The Court noted that "it is uniformly held that relevancy is a question of law." *Ibid.* The Court also stated that the question of pertinency was "not essentially different from the question as to materiality of false testimony charged as perjury." *Ibid.* In that setting, the Court observed, "the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." *Ibid.* (citing *Carroll* v. *United States*, 16 F.2d 951 (2d Cir.), cert. denied, 273 U.S. 763 (1927); *United States* v. *Singleton*, 54 F. 488 (S.D. Ala. 1892); *Cothran* v. *State*, 39 Miss. 541, 547 (1860)).

The Court determined that "[t]he reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with

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[8] Transcript of Record at 114-115, *Sinclair* v. *United States*, No. 555 (O.T. 1928).

[9] Certificate at 13, *Sinclair* v. *United States*, No. 555 (O.T. 1928); see also *Sinclair*, 279 U.S. at 284.

equal force to the determination of pertinency arising under § 102." *Sinclair*, 279 U.S. at 299. Accordingly, the Court held that "[i]t would be incongruous and contrary to well-established principles to leave the determination of [pertinency] to a jury." *Ibid.* In several subsequent decisions involving prosecutions under the same statute, the Court reiterated its holding in *Sinclair* that pertinency was a question of law to be decided by the court. *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962); *Deutch* v. *United States*, 367 U.S. 456, 471 (1961); *Braden* v. *United States*, 365 U.S. 431, 436-437 (1961).

2. The Court reaffirmed the teaching of *Sinclair* in *Kungys* v. *United States*, *supra*, which addressed the related question whether "materiality" was an issue of law under a denaturalization provision. 485 U.S. at 772. *Kungys* arose under 8 U.S.C. 1451(a), which provides for the denaturalization of citizens whose citizenship orders and certificates of naturalization "were illegally procured or were procured by concealment of a material fact or by willful misrepresentation." The Court treated materiality as an implied requirement of the "misrepresentation" clause of Section 1451(a), 485 U.S. at 767 (citing *Fedorenko* v. *United States*, 449 U.S. 490, 507 n.28 (1981)), and held that materiality was an issue of law for determination by the court.

The Court observed in *Kungys* that the inclusion of a materiality requirement in false statement statutes has ancient origins. 485 U.S. at 769 (citing 3 E. Coke, *Institutes* 164 (6th ed. 1680), and 4 W. Blackstone, *Commentaries* *137 (both discussing perjury statutes)). The Court also noted that the "most prominent" modern federal statute that punishes "false statements to public officials" is 18 U.S.C. 1001,

which, like its "common-law antecedents," employs the term " 'material.' " 485 U.S. at 769-770. After defining the term "materiality" in 8 U.S.C. 1451(a) to accord with its "established meaning," 485 U.S. at 770-771, the Court turned to whether "materiality * * * is an issue of law, which we may decide for ourselves, or one of fact, which must be decided by the trial court." *Id.* at 772. "Here again," the Court said, "we see no reason not to follow what has been done with the materiality requirement under other statutes dealing with misrepresentations to public officers." *Ibid.*

To determine how materiality was treated in analogous contexts, the Court in *Kungys* looked to *Sinclair* and to case law concerning Section 1001. The Court noted that *Sinclair* had held that "[t]he materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." *Kungys*, 485 U.S. at 772 (quoting *Sinclair*, 279 U.S. at 298). The Court also quoted the Sixth Circuit's reasoning "in a case involving 18 U.S.C. § 1001":

> [A]lthough the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law. Since it is the court's responsibility to interpret the substantive law, we believe [it is proper to treat] the issue of materiality as a legal question.

Kungys, 485 U.S. at 772 (quoting, with bracketed language added, *United States* v. *Abadi*, 706 F.2d 178, 180, cert. denied, 464 U.S. 821 (1983)). Accordingly, the Court in *Kungys* concluded, as it had in *Sinclair*, that materiality under the false statement statute before it was to be decided by a court as an issue of law.

B. The Practice Of Having The Court Determine Materiality Has Deep Historical Roots

The holding of *Sinclair*, relied on in *Kungys*, that materiality requirements raise issues of law for determination by a court is supported by a long historical tradition. The law has long punished false statements to courts and to other governmental entities. From the earliest times, however, punishment has been reserved for false statements that are "material" —*i.e.*, statements that have the capacity to corrupt governmental processes. Also, from early times, the courts in England and this country have held that materiality is an issue of law to be decided by the court rather than the jury.

As this Court recognized in *Kungys*, in English law the materiality of a false statement has always been considered an element of perjury. 485 U.S. at 769. In the United States, the "English definition of perjury was, in the main, embraced by the colonists." R. Underwood, *False Witness: A Lawyer's History of the Law of Perjury*, 10 Ariz. J. Int'l & Comp. L. 215, 245 (1993). In particular, the early American treatises agreed that materiality is an element of perjury, see 2 J. Bishop, *Commentaries on the Criminal Law* § 860, at 570 (1858); F. Wharton, *A Treatise on the Criminal Law of the United States* 650-651 (2d ed. 1852); see also 2 Z. Swift, *A Digest of the Laws of the State of Connecticut* 320-322 (1823), even when a perjury statute does not expressly require proof of materiality, see, *e.g.*, Wharton, *supra*, at 648 n.(*b*); 48 C.J. *Perjury* § 2, at 820-821 (1929).

The great weight of authority in England held that materiality was a question for the court rather than the jury. Although the issue does not appear to have merited discussion in pre-nineteenth century deci-

sions, it became firmly established during that century that materiality in perjury prosecutions was for the court to decide. See 3 W. Russell, *A Treatise on Crimes and Misdemeanors* 22 n.(*w*) (5th ed. 1877) ("In every previous case materiality has been treated as a question of law, and it is submitted that it is clearly so."). Indeed, the English courts only began to discuss the issue after Lord Campbell decided to let the jury determine whether a statement charged as perjury was "material" in *Regina* v. *Lavey*, 3 Car. & K. 26, 30, 175 Eng. Rep. 448, 450 (Q.B. 1850). Judicial reaction was swift and negative. In *The Queen* v. *Courtney*, 5 Ir. R.-C.L. 434 (Ct. Cr. App. 1856), for example, when the defendant relied on *Lavey* for the proposition that the question of materiality was for the jury, all five judges rejected that rule and stated in dictum that materiality was virtually always a question for the judges. As Bishop Greene noted, "I should have little hesitation in adopting the view of my Brethren, that it has been the uniform practice of the Judge to detemine whether the particular matter was or was not material." *Id.* at 441-442.[10] In 1911, the issue was conclusively set-

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[10] Similarly, in *Regina* v. *Gibbon*, Le. & Ca. 109, 169 Eng. Rep. 1324 (1861), a defendant convicted of perjury appealed, claiming that the false testimony was not admissible. The judges treated the issue as a question of law, and when the *Lavey* case was mentioned, Bishop Channell stated that "I never could understand that case * * *. [The facts] having been ascertained, the question of materiality was no longer for the jury." *Id.* at 1326; see also *Regina* v. *Southwood*, 1 F. & F. 356, 356, 175 Eng. Rep. 762, 762 (1858) ("The question of materiality is for me."). American treatise writers also rejected Lord Campbell's decision in *Lavey*. See note 13, *infra*.

tled by the enactment of a statute providing that "[t]he question whether a statement on which perjury is assigned was material is a question of law to be determined by the court of trial." Perjury Act 1911, § 1(6), 12 *Halsbury's Statutes of England and Wales* 162 (4th ed. 1994 reissue).

The courts in this country observed the same practice. The state courts, with virtual unanimity, adopted the principle of English law that materiality in perjury prosecutions is a question for the court rather than the jury. The earliest reported case on the question appears to be *Power* v. *Price*, 16 Wend. 450 (N.Y. 1836). In *Power*, New York's highest court held that a trial judge had correctly reserved the question of materiality to itself. The court explained (*id.* at 456):

> [T]he court was clearly right in instructing the jury that the testimony given on the former trial was proved to be material. The court, in this part of its charge, did not take from the jury the decision of any matter of fact which was proper for their cognizance: it merely decided a question of law, arising upon the proof of facts as to which there was no dispute or contrariety of testimony.

Subsequently, all but one nineteenth century state court to consider the issue reached the same conclusion.[11]

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[11] See *Steinman* v. *McWilliams*, 6 Pa. (6 Barr) 170, 177-178 (1847); *Cothran* v. *State*, 39 Miss. 541, 547 (1860); *State* v. *Williams*, 30 Mo. 364, 367 (1860); *People* v. *Jones*, 1 Mich. N.P. (1 Brown) 141, 141 (Cir. Ct. 1869); *State* v. *Lewis*, 10 Kan. 157, 160 (1872); *Lawrence* v. *State*, 2 Tex. Crim. 479, 483-484 (1877); *Nelson* v. *State*, 32 Ark. 192, 198-199 (1877); *Renan* v. *Commonwealth*, 2 Ky. L. Rptr. 66, 66

Federal courts in the nineteenth century similarly held that materiality in a perjury case presented a question of law for the court. *United States* v. *Bedgood*, 49 F. 54, 60 (S.D. Ala. 1891) ("the question of materiality is for the court to decide, in view of the law as applicable to the particular proceeding"); *United States* v. *Singleton*, 54 F. 488, 489 (S.D. Ala. 1892) ("the question of materiality is for the court"); cf. *United States* v. *Landsberg*, 23 F. 585, 586-587 (C.C.S.D.N.Y. 1882) (on a motion for new trial, judge adopts per se rule that false statement is material if it was answering a question going to witness's credibility).[12] The prevailing rule was

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(1880) (syllabus); *Gordon* v. *State*, 48 N.J.L. (19 Vroom) 611, 612 (1886); *State* v. *Hare*, 95 N.C. 682 (1886) (implicit); *Young* v. *People*, 134 Ill. 37, 42 (1890); *People* v. *Lem You*, 97 Cal. 224, 228-230 (1893); *State* v. *Caywood*, 96 Iowa 367, 374 (1895); *Peters* v. *United States*, 2 Okla. 138, 144 (1894) (applying federal law); *Barnes* v. *State*, 15 Ohio C.C. 14, 25-26 (1898); *Thompson* v. *People*, 26 Colo. 496, 504 (1899).

The sole exception was Louisiana, which initially adopted Lord Campbell's view that the question of materiality was for the jury, in part because "[t]he jury in Louisiana are judges of the law and the fact." *State* v. *Spencer*, 45 La. Ann. 1, 11-12 (1892). Soon thereafter, however, Louisiana retreated from the position that the jury should determine materiality, see *State* v. *Brown*, 111 La. 170, 172 (1903), and ultimately adopted the majority rule that materiality is a question of law for the court, see *State* v. *Occhipinti*, 358 So. 2d 1209, 1210 (La. 1978).

[12] In one early federal case, the report states that the government, relying on an unreported decision by Judge Lomax (a judge of the General Court of Virginia), argued that materiality was a fact to be ascertained by the jury. The court, however, did not reach the issue. *United States* v. *Cowing*,

summed up in *Carroll* v. *United States*, *supra*, which stated that whether the indictment charged "any 'material' matter was a question of law for the court, and was not for the jury," which is the same "rule [that] obtains in the state courts." 16 F.2d at 954. The *Carroll* decision was one of the perjury cases cited with approval by this Court in *Sinclair*. See 279 U.S. at 298 (citing *Carroll*).

Nineteenth century treatise writers confirmed that the issue of materiality in a perjury prosecution presented a question of law for the court to decide. As one leading treatise stated, "[t]he *facts* being proved, the question, whether they are material or not, is a question of *law*." 3 S. Greenleaf, *A Treatise on the Law of Evidence* § 195, at 183 n.5 (2d ed. 1853); accord Wharton, *supra*, at 656 ("On the question of perjury, the materiality of the facts testified to, is a question of law."); 2 J. Bishop, *Commentaries on the Law of Criminal Procedure* § 874, at 503-504 (1866) ("assuming this evidence [of the testimony's materiality] to be true, the question of materiality becomes one of law for the court, not of fact for the jury"); see also 2 J. Bishop, *Commentaries on the*

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25 F. Cas. 680, 681 (C.C.D.C. 1835) (No. 14,880). Some federal decisions indicate that if the determination of materiality implicates disputed factual issues, the jury should determine those issues, but that the application of law to those facts remains the province of the court. See *United States* v. *Shinn*, 14 F. 447, 452 (C.C.D. Or. 1882) ("Where the facts are disputed, the question should be left to the jury, with proper instructions from the court. But when the facts are admitted the question of materiality is one for the court."); *United States* v. *Hall*, 44 F. 864, 867 (S.D. Ga. 1890) (jury charge: 'I charge you further, if you find from the evidence that [certain facts existed] his testimony on the

Criminal Law § 1039a, at 593 (7th ed. 1882).[13] Some commentators noted the jury's role in resolving factual disputes antecedent to the materiality determination but regarded it as settled by the end of the century that the ultimate determination of whether a false statement was material in a perjury case belonged to the court.[14]

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occasion described would be in a matter material to the issue.").

[13] After Lord Campbell's decision in *Lavey* became known, the treatise writers incorporated it into their discussions. For example, Greenleaf, while retaining his previous statement that materiality was a question of law, also reported that "[i]t seems that the materiality of the matter assigned is a question for the jury. [citing, among other authorities, *Lavey*]. But see apparently *contra,* [two other English cases in which the court found materiality was for the judge]." 3 S. Greenleaf, *A Treatise on the Law of Evidence* § 195, at 189 n.(*b*) (14th ed. 1883). By 1899, Greenleaf again was reporting that "[w]hether the evidence was matrial or not was a question entirely for the court, and not at all for the jury." 3 S. Greenleaf, *A Treatise on the Law of Evidence* § 195, at 196 n.2 (16th ed. 1899).

Similarly, Wharton rejected *Lavey,* explaining:

> According to Lord Campbell, the materiality of the alleged false oath is for the jury. But the weight of authority is that it would be error to leave the question to the jury without definite instructions from the court. And the proper course is for the court, assuming all the evidence to be true, to determine whether the particular article of evidence is or is not material. Any dispute as to the truth of facts, however, must go to the jury.

2 F. Wharton, *A Treatise on Criminal Law* § 1548, at 170 (J. Kerr ed., 11th ed. 1912) (footnotes omitted); see also F. Wharton, *A Treatise on the Law of Evidence in Criminal Issues* § 86, at 270 (O.N. Hilton ed., 10th ed. 1912).

[14] In addition to sources previously cited in the text and notes 12 and 13, *supra,* see, *e.g.,* 4 B. Elliott & W. Elliott, *A*

C. Section 1001, Like Its Historical Antecedents, Assigns The Question Of Materiality To The Court

In accordance with *Sinclair* and *Kungys*, every regional court of appeals except the Ninth Circuit has held that materiality under 18 U.S.C. 1001 is a question of law for the court.[15] That conclusion is

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Treatise on the Law of Evidence § 3073, at 386 (1905) ("Questions of fact are for the jury in perjury cases as in other criminal cases. But the question as to whether the alleged false testimony or oath upon which perjury is assigned is material within the rule in regard to perjury is generally held to be a question for the court."); 2 E. McClain, *A Treatise on the Criminal Law* § 866, at 89 (1897) ("The question as to whether the alleged false oath was material to the issues in the case in which it was taken is for the court and not the jury."). Only one treatise writer appeared to equivocate on that issue. See J. May, *The Law of Crimes* § 188, at 205 (1881) ("Whether materiality is a question of law for the court or of fact for the jury, is a point upon which the authorities are about equally divided."). But later editions of May's treatise found the issue to be resolved in favor of the court deciding materiality. See K. C. Sears & H. Weihofen, *May's Law of Crimes* § 93, at 119 (4th ed. 1938) ("Whether materiality is a question of law for the court, or of fact for a jury, is a point upon which the authorities are now generally agreed. It belongs to the court.").

[15] See *United States* v. *Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States* v. *Gribben*, 984 F.2d 47, 50-51 (2d Cir. 1993); *United States* v. *Greber*, 760 F.2d 68, 73 (3d Cir.), cert. denied, 474 U.S. 988 (1985); *United States* v. *Arch Trading Co.*, 987 F.2d 1087, 1095 (4th Cir. 1993); *United States* v. *Hausmann*, 711 F.2d 615, 616 (5th Cir. 1983); *United States* v. *Abadi*, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821 (1983); *United States* v. *Martel*, 792 F.2d 630, 637 (7th Cir. 1986); *United States* v. *Johnson*, 937 F.2d 392, 396 (8th Cir. 1991); *United States* v. *Daily*, 921 F.2d 994, 1004-1006 (10th Cir. 1990), cert. denied, 112 S. Ct. 405 (1991); *United States* v. *Lopez*, 728 F.2d 1359,

correct. The requirement of materiality in statutes criminalizing false statements to public officials stems from well-recognized common law traditions, see *Kungys*, 485 U.S. at 769, and, as shown above, it was settled by the beginning of this century that the issue of materiality in perjury prosecutions was a question to be decided by the court rather than the jury. Nothing in the text or history of Section 1001 suggests that Congress meant to depart from that tradition.

While the original antecedent of Section 1001 was enacted in 1863, see *United States* v. *Bramblett*, 348 U.S. 503, 504 (1955), the term "material" was first introduced into the provision that became Section 1001 by the Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015. See *United States* v. *Yermian*, 468 U.S. 63, 70 & n.8 (1984).[16] By that time, prominent authorities had made clear that materiality in perjury statutes was an issue for the court. See pp. 16-21, *supra*.

1362 n.4 (11th Cir.), cert. denied, 469 U.S. 828 (1984); *United States* v. *Hansen*, 772 F.2d 940, 950-951 (D.C. Cir. 1985) (Scalia, J.), cert. denied, 475 U.S. 1045 (1986).

[16] As amended in 1918, Section 35 of the Criminal Code in relevant part punished with a fine, imprisonment, or both (40 Stat. 1015-1016 (emphasis added))

> whoever, for the purpose of obtaining or aiding to obtain the payment or approval of [a false, fictitious, or fraudulent] claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, *shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations.*

The predecessor of Section 1001 was made explicitly applicable to false statements "in any matter within the jurisdiction" of the federal government and put substantially in its current form by the Act of June 18, 1934, ch. 587, 48 Stat. 996; see *Yermian*, 468 U.S. at 70-73; *United States* v. *Rodgers*, 466 U.S. 475, 477-478 (1984); *Bramblett*, 348 U.S. at 506-508; *United States* v. *Gilliland*, 312 U.S. 86, 92-95 (1941).

At no point did Congress suggest that it intended to veer from the prevailing common law treatment of materiality as an issue of law for resolution by the court. In the absence of evidence to the contrary, Congress is presumed to have adopted that tradition as part of the "cluster of ideas" surrounding the concept of materiality in analogous state and federal perjury statutes. See *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.").

Indeed, in *Kungys* this Court applied the same reasoning in construing the term "materiality" in 8 U.S.C. 1451(a). After quoting the definition of materiality applied under other federal statutes, including Section 1001, the Court held that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." 485 U.S. at 770

(quoting *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981)); see also *Molzof* v. *United States*, 112 S. Ct. 711, 716 (1992). Perjury laws and Section 1001 have similar purposes,[17] and the two statutes employ the requirement of materiality for a similar function.[18] In light of the uniform treatment in perjury statutes of materiality as a question for the court, Section 1001 is correctly read to assign the determination of materiality to the court as an issue of law.

II. THE DETERMINATION OF MATERIALITY BY THE COURT IS CONSTITUTIONAL

The court of appeals concluded that the resolution of the issue of materiality by the court rather than the jury violates a criminal defendant's right under the Fifth Amendment's Due Process Clause and the Sixth Amendment's jury trial guarantee to have "the

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[17] Both statutes punish falsehoods that have the capacity to corrupt decisionmaking by government bodies or tribunals. See *United States* v. *Rodgers*, 466 U.S. at 480 (Section 1001 "protect[s] the authorized functions of governmental departments and agencies from the perversion which might result from * * * deceptive practices"); *Bronston* v. *United States*, 409 U.S. 352, 357 (1973) (perjury statute "keep[s] the course of justice free from the pollution of perjury"); *Freidus* v. *United States*, 223 F.2d 598, 601 n.10 (D.C. Cir. 1955) (noting close kinship between Section 1001 and perjury statutes).

[18] In each setting, the materiality requirement excludes from liability statements that, although false, could not tend to undermine the governmental process. Compare, *e.g.*, *Weinstock* v. *United States*, 231 F.2d 699, 701-702 & n.6 (D.C. Cir. 1956) (construing Section 1001) with *Carroll*, 16 F.2d at 953 (construing perjury statute).

facts essential to establish the elements of a crime * * * decided by a jury" beyond a reasonable doubt. Pet. App. 6a. That conclusion is unfounded. The long tradition in this country that the issue of materiality is determined by the court as a matter of law creates a strong presumption that the practice is constitutional. In this case, neither the modern articulation of the jury's role in a criminal case in decisions such as *In re Winship*, 397 U.S. 358 (1970), nor considerations of fairness provide a basis for invalidating the traditional rule under the Constitution. The question of materiality requires determinations of law, and those legal issues fall outside of the jury's classic province.

A. The Historical Allocation Of Materiality To The Court Attests To Its Constitutionality

"As this Court has stated from its first Due Process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2339 (1994); see *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).[19] That principle has often been applied in evaluating constitutional attacks on criminal laws and procedures. For example, this Court has given traditional practice great weight in due process challenges involving "the permissible limits in defining criminal conduct." *Schad* v. *Arizona*, 501 U.S. 624, 631 (1991) (plurality opinion). It has also relied heavily on historical practice in considering due process challenges to the manner in

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[19] The Due Process Clause of the Fifth Amendment provides: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

which a State has allocated the burden of proof under a criminal statute. See, *e.g.*, *Medina* v. *California*, 112 S. Ct. 2572, 2577-2578 (1992); *Martin* v. *Ohio*, 480 U.S. 228, 235-236 (1987); *Patterson* v. *New York*, 432 U.S. 197, 202-211 (1977). Such reliance on history "recognize[s] the high probability that legal definitions, and the practices comporting with them, are unlikely to endure for long, or to retain wide acceptance, if they are at odds with notions of fairness and rationality sufficiently fundamental to be comprehended in due process." *Schad*, 501 U.S. at 642 (plurality opinion); *Medina*, 112 S. Ct. at 2582 (O'Connor, J., concurring in the judgment) ("historical pedigree can give a procedural practice a presumption of constitutionality"); see *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 17-18 (1991).

Historical endorsement of a practice challenged on due process grounds is not dispositive of the challenge. See *Medina*, 112 S. Ct. at 2578; *id.* at 2582 (O'Connor, J., concurring in the judgment); *Schad*, 501 U.S. at 642-643 (plurality opinion). The resolution of the due process issue also encompasses an inquiry into whether the practice "transgresses any recognized principle of 'fundamental fairness.'" *Medina*, 112 S. Ct. at 2578 (quoting *Dowling* v. *United States*, 493 U.S. 342, 352 (1990)); see *Schad*, 501 U.S. at 642 (plurality opinion). When the endorsement of history is as longstanding and widespread as it is here, however, it is not likely that the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 112 S. Ct. at 2577 (quoting *Patterson*, 432 U.S. at 202).

History is likewise significant in deciding whether the determination of materiality by the court in-

fringes the jury trial guarantee of the Sixth Amendment.[20] This Court has construed the constitutional right to a jury trial in light of the practices observed in criminal jury trials when the Constitution was ratified and in later years. See *Holland* v. *Illinois*, 493 U.S. 474, 481 (1990) (relying on "unbroken tradition" of common and statutory law in construing the right to an "impartial jury"). "The process of determining the content of the Sixth Amendment right to jury trial has long been one of careful evaluation of, and strict adherence to the limitations on, that right as it was known in criminal trials at common law." *Johnson* v. *Louisiana*, 406 U.S. 356, 370 n.6 (1972) (opinion of Powell, J.). When this Court has "turn[ed] to other than purely historical considerations," it has done so in addressing the constitutionality of departures from the common law characteristics of a jury. *Williams* v. *Florida*, 399 U.S. 78 (1970) (upholding criminal jury composed of fewer than 12 jurors); see *Apodaca* v. *Oregon*, 406 U.S. 404, 407-414 (1972) (opinion of White, J.) (upholding state law providing for less than unanimous verdict).

In this case, historical practice creates a powerful presumption that neither the Fifth nor the Sixth Amendment requires a jury determination of materiality. As we have discussed, the nearly universal approach to the issue in English and American cases and commentary assigned the determination of materiality in a perjury case to the court as a question

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[20] The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

of law. See pp. 16-21, *supra*. This Court reaffirmed that view in *Sinclair* v. *United States*, *supra*, based on the long historical tradition and the rationales supporting it. And "[c]ontemporary practice, while of limited relevance to the due process inquiry," *Medina*, 112 S. Ct. at 2578, see *Patterson*, 432 U.S. at 211, has generally adhered to that approach, as reflected in decisions of the state courts [21] and the

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[21] In the last 25 years, 11 state supreme courts have held that materiality is an issue for the judge. See *State* v. *Rosenbaum*, No. 974-93, 1994 WL 665576 (Tex. Crim. App. 1994) (en banc); *Gullett* v. *State*, 523 So. 2d 296, 300 (Miss. 1988); *State* v. *West*, 419 So. 2d 868, 874 (La. 1982); *State* v. *Hanson*, 302 N.W.2d 399, 401 (N.D. 1981); *State* v. *Lunney*, 400 A.2d 759, 763 (Me. 1979) (construing state perjury statute expressly assigning materiality to court); *State* v. *Thompson*, 576 P.2d 1105, 1107 (Mont. 1978) (same); *State* v. *Edgington*, 573 P.2d 1059, 1064 (Kan. 1978); *Williams* v. *State*, 535 S.W.2d 842, 845 (Ark. 1976); *State* v. *Deets*, 195 N.W.2d 118, 122 (Iowa 1972); *Wolfe* v. *State*, 271 So. 2d 132, 133 (Fla. 1972). During the same period, intermediate appellate courts in six other States reached the same conclusion. *People* v. *Powell*, 513 N.E.2d 1162, 1165-1166 (Ill. App. Ct. 1987), appeal denied, 520 N.E.2d 391 (Ill.), cert. denied, 486 U.S. 1025 (1988); *State* v. *Albin*, 720 P.2d 1256, 1259 (N.M. Ct. App.), cert denied, 719 P.2d 1267 (N.M. 1986); *People* v. *Hoag*, 318 N.W.2d 579, 583 (Mich. Ct. App. 1982); *Commonwealth* v. *Lafferty*, 419 A.2d 518, 521 (Pa. Super. Ct. 1980); *State* v. *Roberson*, 543 S.W.2d 817, 820 (Mo. Ct. App. 1976); *State* v. *Daniels*, 520 P.2d 178, 179 (Wash. Ct. App.), review denied, 84 Wash. 2d 1002 (1974). In three additional States, the state supreme court made the same holding while rejecting a claim that allocating materiality to the judge violated the defendant's due process and Sixth Amendment rights. See *State* v. *French*, 509 N.W.2d 698, 700-702 (S.D. 1993); *State* v. *Strand*, 720 P.2d 425, 431 (Utah 1986); *People* v. *Smith*, 597 P.2d 204, 205-206 (Colo. 1979). The highest courts in only two States have found that leaving the ques-

federal courts.[22]

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tion of materiality for the judge violates due process and the Sixth Amendment. See *State* v. *Anderson*, 603 A.2d 928, 932-935 (N.J. 1992); *Commonwealth* v. *McDuffee*, 398 N.E.2d 463, 467-470 (Mass. 1979). Contrary to the court of appeals' suggestion, Pet. App. 9a, California has not definitively resolved the issue. See *People* v. *Hedgecock*, 795 P.2d 1260, 1267 (Cal. 1990) (addressing "materiality" under campaign finance law; distinguishing materiality in perjury statutes, and "express[ing] no view whether in perjury prosecutions based on false testimony at a judicial or legislative proceeding the question of materiality is a jury issue").

We also note that the perjury statute in the Model Penal Code states: "Whether a falsification is material in a given factual situation is a question of law." 2 American Law Institute, *Model Penal Code & Commentaries* § 241.1(2), at 93 (1980). Likewise, the perjury statute proposed by the National Conference of Commissioners on Uniform State Laws states: "[W]hether a statement was material * * * is a question of law to be determined by the court." Model Act on Perjury § 4(2). See American Law Institute, *Model Penal Code (Tentative Draft No. 6)* App., at 160 (1957).

[22] Every regional court of appeals, including the Ninth Circuit, has held that materiality is a question of law to be decided by the court in prosecutions under 18 U.S.C. 1623, which punishes the making of false statements to a court or grand jury. See Pet. App. 32a-33a (citing cases). There is similar uniformity with respect to other statutes punishing false statements to governmental entities. The Ninth Circuit and six other courts of appeals have held that materiality of perjured statements under 18 U.S.C. 1621 is decided by the court. See *United States* v. *Clark*, 918 F.2d 843, 845-846 (9th Cir. 1990); *United States* v. *Alu*, 246 F.2d 29, 32 (2d Cir. 1957); *United States* v. *Forrest*, 623 F.2d 1107, 1112-1113 (5th Cir.), cert. denied, 449 U.S. 924 (1980); *United States* v. *Giacolone*, 587 F.2d 5, 6 (6th Cir. 1978), cert. denied, 442 U.S. 940 (1979); *United States* v. *Rivera*, 448 F.2d 757, 758 (7th Cir. 1971); *Masinia* v. *United States*, 296 F.2d 871, 874 (8th Cir. 1961); *United States* v. *Masters*,

Against that background, it would take a considerable showing of fundamental unfairness to justify rejection of the historical approach to materiality. Here, no such showing has been made.

B. The Principles Of *In Re Winship* Do Not Require Departure From Longstanding Practice

The court of appeals declined to follow this Court's statement in *Sinclair* that materiality is a question for the court rather than the jury, because the court believed that *Sinclair* does not "survive the more recent holdings of the Supreme Court that the Sixth Amendment and the Due Process Clause require that the facts essential to establish the elements of a crime must be decided by a jury." Pet. App. 6a. The Ninth Circuit identified the earliest decision so holding as *In re Winship*, *supra*. See Pet. App. 6a; see also *id.* at 9a, 15a-16a. *Winship*, however, provides no support for casting aside the historical treatment of materiality as an issue of law for the court.

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484 F.2d 1251, 1254 (10th Cir. 1973). Seven courts of appeals, including the Ninth Circuit, have also held that materiality is for the court to decide in cases of false statements in tax returns, 26 U.S.C. 7206(1). See *United States* v. *Romanow*, 509 F.2d 26, 28 (1st Cir. 1975); *United States* v. *Greenberg*, 735 F.2d 29, 31 (2d Cir. 1984); *United States* v. *Taylor*, 574 F.2d 232, 235 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *United States* v. *Haynes*, 573 F.2d 236, 240 (5th Cir.), cert. denied, 439 U.S. 850 (1978); *United States* v. *Whyte*, 699 F.2d 375, 379 (7th Cir. 1983); *United States* v. *Flake*, 746 F.2d 535, 537-538 (9th Cir. 1984), cert. denied, 469 U.S. 1225 (1985); *United States* v. *Strand*, 617 F.2d 571, 573-574 (10th Cir.), cert. denied, 449 U.S. 841 (1980); *United States* v. *Gaines*, 690 F.2d 849, 858 (11th Cir. 1982); but see *United States* v. *Null*, 415 F.2d 1178, 1181 (4th Cir. 1969) (submitting issue to jury).

1. *Winship* concerned whether, in determining whether a juvenile had committed a crime and should therefore be declared a delinquent, a State had to meet the standard of proof applicable in a criminal trial—proof beyond a reasonable doubt. 397 U.S. at 359. As an initial matter, the Court confirmed that due process requires the government to meet the reasonable doubt standard in a criminal trial.

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Id. at 364. The Court then determined that the "same considerations" that require proof beyond a reasonable doubt in criminal trials also require the application of that standard in juvenile delinquency proceedings. *Id.* at 365.

The holding of *Winship* has no direct application in this case; the question presented here does not concern the degree of proof that the government must meet with regard to a particular factual question in a criminal proceeding. Instead, it concerns whether the issue of materiality is one of law for decision by the court, or one of fact for decision by the jury. *Winship* did not address the standards for distinguishing questions of law from issues of fact.[23]

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[23] No decision of this Court has applied *Winship* for that purpose. Most decisions of this Court applying *Winship* fall into one of two categories, each of which concerns the burden of proof. In one category are cases in which a criminal defendant challenges the manner in which a State has allo-

Although the *Winship* principle is sometimes broadly described as requiring the jury to decide "all the elements of a criminal offense," *e.g.*, *Estelle* v. *McGuire*, 112 S. Ct. 475, 480 (1991); see *Victor* v. *Nebraska*, 114 S. Ct. 1239, 1242 (1994); *Patterson* v. *New York*, 432 U.S. 197, 210 (1977), the principle actually applies to only the factual components of the essential elements. Pet. App. 8a n.1. As the Court explained in *Sullivan* v. *Louisiana*, 113 S. Ct. 2078 (1993), "[t]he prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder beyond a reasonable doubt of the facts necessary to establish each of those elements." *Id.* at 2080 (internal quotation marks and citations omitted); see also *County Court* v. *Allen*, 442 U.S. 140, 156 (1979) (equating "an element of the crime" to "an 'ultimate' or 'essential' fact," as distinguished from " 'evidentiary' or 'basic' facts"); *Patterson*, 432 U.S. at 206 (due process requires that "the facts constituting a crime [be] established beyond a reasonable doubt"); *Winship*, 397 U.S. at 364 (reasonable doubt standard reduces margin of "error in factfinding" for defendant).

The principle that the jury decides the facts constituting an offense, while the court decides issues of law, was established long before *Winship*. It was settled by this Court in *Sparf & Hansen* v. *United*

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cated the burden of proof with respect to a particular fact in a criminal trial. See, *e.g.*, *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). The other category comprises cases involving non-criminal proceedings in which it is claimed that due process requires a higher standard of proof than the "preponderance of the evidence" standard usually applied in such proceedings. See, *e.g.*, *Santosky* v. *Kramer*, 455 U.S. 745 (1982).

States, 156 U.S. 51, 105-106 (1895). See *Johnson* v. *Louisiana*, 406 U.S. 356, 370 n.6 (1972) (opinion of Powell, J.) (citing *Sparf* for the "fact-law" allocation of decisionmaking between jury and judge); *Sullivan* v. *Louisiana*, 113 S. Ct. at 2080 (same); J. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 256 & n.2 (reprint 1969) (1898) (same); see also *Davis* v. *United States*, 160 U.S. 469, 493 (1895). In England, the principle has been traced to statements by Lord Coke in the sixteenth century. See, *e.g.*, Thayer, *supra*, at 185; 9 J. Wigmore, *Evidence* § 2549, at 640 (J. Chadbourn rev. ed. 1981). In civil actions in this country, the jury's authority to find facts is reflected in the Seventh Amendment's provision that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

By the time of the decision in *Sinclair*, the principle had been stated "over and over again." Brief for Appellant at 109, *Sinclair* v. *United States*, No. 555 (O.T. 1928); see also *id.* at 110 (citing, among other authorities, *Sparf*, *supra*); 1 T. Cooley, *A Treatise on Constitutional Limitations* 678 & n.3 (W. Carrington ed., 8th ed. 1927) (treating as "settled" the "independence of the jury, with respect to the matters of fact in issue before them"). Indeed, the defendant in *Sinclair* presented a constitutional argument that parallels respondent's argument in this case. The defendant in *Sinclair* claimed that the trial court's failure to submit the question of pertinency to the jury violated the Sixth Amendment. He argued that, under that Amendment, "it has been said over and over again, that every essential ingredient of the crime must be proven to the satisfaction of the jury

beyond a reasonable doubt." Brief for Appellant at 109, *Sinclair* v. *United States*, No. 555 (O.T. 1928) (citing *Egan* v. *United States*, 52 App. D.C. 384, 393 (1923); *Agnew* v. *United States*, 165 U.S. 36 (1897)); see also *id.* at 110 (quoting *Sparf, supra*); *Sinclair*, 279 U.S. at 276-277 (argument for appellant); *id.* at 291. He further argued that, because the pertinency of the questions that he refused to answer was an essential element of the crime with which he was charged, "[t]he court, in withdrawing from the jury the question of pertinency * * * denied [him] the right of trial by jury." Brief for Appellant at 107, *Sinclair* v. *United States*, No. 555 (O.T. 1928).

In rejecting the defendant's argument that "pertinency" was a jury issue, *Sinclair* necessarily held that the constitutional principles on which the defendant relied did not undermine the traditional rule that legal questions, like the issue of materiality, are within the province of the court to decide.[24] *Sinclair*,

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[24] *Sinclair* is not distinguishable on the basis that it involved "pertinency" under Rev. Stat. § 102, whereas the present case involves "materiality" under 18 U.S.C. 1001. *Sinclair* itself drew an analogy between Section 102's "pertinency" requirement and the materiality requirement in perjury prosecutions, an analogy that this Court reiterated in *Kungys* v. *United States*, with specific reference to the materiality requirement of Section 1001. 485 U.S. at 772. Nor is *Sinclair* distinguishable based on the Ninth Circuit's view that "materiality" is an element of proof under Section 1001, in the sense that the prosecution must plead and prove it. Pet. App. 10a-12a. The Court in *Sinclair* similarly determined that "pertinency" was an element of the prosecution's case, in the sense that it was "incumbent upon the United States to plead and show that the question [that the defendant refused

therefore, does not conflict with the principles that the court of appeals discerned in the *Winship* line of cases.[25] Now, as when *Sinclair* was decided, those principles do not justify a departure from the allocation of materiality in a false statements case to the court.

2. There is, of course, an intersection between *Winship*'s holding regarding the burden of proof in a criminal case and the allocation of legal and factual issues between court and jury as stated in *Sparf*. The Court held in *Sparf* that the jury (rather than the court) must be convinced of the existence of the facts necessary to establish the elements of the offense with which the defendant was charged, and *Winship* removes any doubt that the standard of proof governing the jury's determination of those

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to answer] pertained to some matter under investigation." 279 U.S. at 296-297; see *Russell* v. *United States*, 369 U.S. 749, 755 (1962).

[25] Even the major holding of *Winship*—that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (397 U.S. at 364)—was not an innovation. "Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt." *Patterson*, 432 U.S. at 211. *Winship* itself acknowledged that "[e]xpressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." 397 U.S. at 362 (citing, *inter alia*, *Miles* v. *United States*, 103 U.S. 304, 312 (1881); *Davis* v. *United States*, 160 U.S. 469, 488 (1895); *Holt* v. *United States*, 218 U.S. 245, 253 (1910); *Wilson* v. *United States*, 232 U.S. 563, 569-570 (1914)). Such a firmly rooted principle could not have escaped the Court's attention when it decided *Sinclair*.

facts is beyond a reasonable doubt. As this Court has thus noted, "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." *Sullivan*, 113 S. Ct. at 2081. But the Ninth Circuit erroneously conflated the two requirements in an attempt to justify its refusal to follow *Sinclair* in light of the "later pronouncements in *Winship* through *Sullivan*." Pet. App. 16a.

There is no tension between *Sinclair* and the principle that the jury in a criminal trial must decide the facts constituting the offense. See Pet. App. 29a (Kozinski, J., dissenting); accord *United States* v. *Daily*, 921 F.2d 994, 1005-1006 & n.14 (10th Cir. 1990), cert. denied, 112 S. Ct. 405 (1991); *United States* v. *Paxson*, 861 F.2d 730, 732 (D.C. Cir. 1988); *United States* v. *Abadi*, 706 F.2d at 180 n.2. As explained above, *Sinclair* determined that materiality in a prosecution for perjury was a question of *law* rather than a question of fact; *Kungys* reaffirmed that determination and found support for it in cases arising under Section 1001. Because materiality is a question of law rather than a question of fact, it need not be submitted to the jury.

For the same reason, materiality need not be proven beyond a reasonable doubt under *Winship*. See, *e.g.*, *United States* v. *Gribben*, 984 F.2d 47, 50-51 (2d Cir. 1993); *United States* v. *Abroms*, 947 F.2d 1241, 1246-1247 & n.5 (5th Cir. 1991) (citing cases), cert. denied, 112 S. Ct. 2992 (1992). Indeed, a question of law, by its nature, is not susceptible to proof by various quanta of evidence. *United States* v. *Watson*, 623 F.2d 1198, 1202 (7th Cir. 1980). One may have varying levels of confidence in a legal determination, but levels of confidence differ from degrees of proof.

Cf. *Jackson* v. *Virginia*, 443 U.S. 307, 315-319 & n.11 (1979) (*Winship* requirement of proof beyond a reasonable doubt refers not only to level of certainty required of factfinder but also to "the actual quantum and quality of proof necessary to support a criminal conviction").[26]

Nor is there any conflict between *Sinclair* and decisions of this Court applying *Winship* in criminal cases. All of those decisions addressed statutes or jury instructions affecting the burden of proof with regard to questions of fact, not questions of law. Most have concerned the question of the defendant's intent, "a question of fact which must be submitted to the jury." *Morissette*, 342 U.S. at 274.[27] These

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[26] Although some language in *Kungys* indicates that materiality under 8 U.S.C. 1451(a) must be proven by clear and convincing evidence, 485 U.S. at 771-772, the standard of proof was not at issue in *Kungys* and the decision cited in *Kungys* for that proposition makes clear that the "clear and convincing" standard applies not to materiality, but to the ultimate factual issue of whether naturalization was illegally procured. See *Schneiderman* v. *United States*, 320 U.S. 118, 158 (1943); see also *Chaunt* v. *United States*, 364 U.S. 350, 353-354 (1960).

[27] See *Carella* v. *California*, 491 U.S. 263, 264 (1989) (per curiam) (statutory presumptions of embezzlement and intent to commit theft by fraud); *Francis* v. *Franklin*, 471 U.S. 307, 309 (1985) (jury instructed that the acts of sane person are presumed to be the product of will, and that a person is presumed to intend the natural and probable consequences of his or her acts); *Connecticut* v. *Johnson*, 460 U.S. 73, 78 (1983) (opinion of Blackmun, J.) (jury instructed that "every person is conclusively presumed to intend the natural and necessary consequences of his act"); *Sandstrom* v. *Montana*, 442 U.S. 510, 513 (1979) (jury instructed that "the law presumes that a person intends the ordinary consequences

post-*Winship* decisions are relevant here only in establishing that the Due Process Clause leaves a legislature broad discretion to define crimes. See, *e.g.*, *Patterson*, 432 U.S. at 210. Nothing in those decisions suggests that Congress exceeded its discretion in Section 1001 by assigning the materiality question to the court.

The post-*Winship* decisions actually support the validity of Section 1001's assignment of materiality to the court. It is clear from those decisions that Congress could have prohibited *all* false statements within the department or agency's jurisdiction, without regard to their materiality. Cf. *Patterson*, 432 U.S. at 209 (New York could have punished all intentional murders, without recognizing any affirmative defenses). Congress also could have punished all such false statements but made immateriality a defense. Cf. *ibid.* As a further alternative, Congress could have made immateriality a factor "affecting * * * the severity of the punishment," *id.* at 207, for consideration by the sentencing court. Cf. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85-86 (1986). In light

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of his voluntary acts"); *Patterson*, 432 U.S. at 198 (statute creating affirmative defense to homicide that defendant "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse"); *Mullaney* v. *Wilbur*, 421 U.S. 684, 688 (1975) (presumption of implied malice aforethought in homicide prosecutions); see also *McMillan* v. *Pennsylvania*, 477 U.S. 79, 81 n.1 (1986) (mandatory minimum sentence for visible possession of firearm during offense); *County Court*, 442 U.S. at 142 (statutory presumption that firearm was in possession of people in vehicle where firearm was found); *Cool* v. *United States*, 409 U.S. 100, 100 (1972) (per curiam) (jury instruction allowing jury to ignore defense testimony unless it believed beyond a reasonable doubt that testimony was true).

of the options open to Congress, it is difficult to conclude that the one option foreclosed to it was assigning determination of materiality to the court.[28]

C. The Determination Of Materiality By The Court Is Not Fundamentally Unfair

Finally, the resolution of the issue of materiality by the judge as a matter of law does not violate "any recognized principle of 'fundamental fairness.'" *Medina*, 112 S. Ct. at 2578 (quoting *Dowling*, 493 U.S. at 352). The Ninth Circuit's contrary conclusion rested on its rejection of this Court's determination in *Sinclair* and *Kungys* that materiality is a question of law. The court of appeals considered materiality under Section 1001 to be a factbound question particularly well-suited to jury determination. See Pet. App. 17a (jury "is entitled to believe or disbelieve the testimony of [government] officials" that a particular misstatement of fact would have had a natural tendency to influence the decision of the government entity). While there is no infallible logical test for viewing a question as one of fact or one of law, see Thayer, *supra*, at 183-262; W. Prosser, *Handbook on the Law of Torts* 205 (4th ed. 1971), "a

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[28] That option, unlike the federal statutory presumptions that this Court has struck down, does not relieve the prosecution of any burden of proof otherwise imposed by the statute. Cf. *Turner* v. *United States*, 396 U.S. 398, 407 n.8 (1970) (rejecting argument that, since Congress could make mere possession of imported drugs a crime, it was permissible for Congress to make it illegal for person to possess imported drugs, knowing them to be imported, with statutory presumption of knowledge triggered by fact of possession); *Leary* v. *United States*, 395 U.S. 6, 34, 37 (1969) (same); *Tot* v. *United States*, 319 U.S. 463, 472 (1943) (same).

page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). As discussed above, history has consistently classified materiality as a question of law for the court. The court of appeals did not identify any compelling reason to reverse that historical judgment.

1. In classifying materiality under Section 1001 as a factbound question, the court of appeals acted on a misunderstanding of the materiality requirement. See Pet. App. 12a-14a, 17a-18a. The court of appeals believed that "a factual inquiry would nearly always be necessary to determine what makes a difference to the decisionmaking body." *Id.* at 12a. The court thus thought it "necessary" in this case "to take testimony of department officials in order to determine whether the block checked on line 303 of the settlement statement would tend to influence the agency's decision to insure the loan." *Id.* at 17a. The court doubted, in light of the "trivial" sums that were entered on line 303 of the settlement statement, that "the particular block checked on line 303" would "have any tendency to influence the agency's decision." *Id.* at 17a-18a.

As the judges dissenting below observed, however, the majority required "too fact-specific an inquiry." Pet. App. 41a. "[A] concealment or misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed." *Kungys*, 485 U.S. at 770 (quoting *Weinstock* v. *United States*, 231 F.2d 699, 701-702 (D.C. Cir. 1956)). As the dissent explained, under that standard, "[t]he proper question is whether false entries on a key line of a government-approved loan

application have 'a natural tendency to affect' the agency's decision, regardless of the amount in question." Pet. App. 41a. That question calls for "a generalized determination * * * that does not vary significantly with the facts of each individual transaction." *Id.* at 42a-43a.[29]

Every legal determination "must, of course, be factually anchored to the case where it is applied." Pet. App. 40a (Kozinski, J., dissenting). Here, for example, the materiality determination requires an understanding of facts about the operation of the loan insurance program that respondent defrauded. Most such facts may be gleaned from the statute and regulations authorizing the program. The district court also had discretion to hear testimony about the loan program by agency officials. The taking of such testimony, however, did not transform the ultimate determination of materiality into a jury question. See *id.* at 17a; see also *id.* at 12a. The court of appeals' contrary view rested on the erroneous premise that materiality may be decided by the court, rather than the jury, "[o]nly if it can be said that there is *no* factual component to the determination of materiality." *Id.* at 13a (emphasis added). As the dissent recognized (*id.* at 40a), many other legal determina-

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[29] Of course, there may be factual disputes antecedent to the materiality determination that would be resolved by the jury because they related to an element of the offense. See p. 21, *supra*. For example, the materiality of a statement may depend on the precise contents of the statement, a matter that may be disputed if the statement was made orally. In that situation, the jury should be allowed to resolve the dispute.

tions that are made by the court rather than the jury require subsidiary factual determinations.[30]

The court of appeals correctly observed that judges "frequently submit far more complex questions [than materiality] to juries and have found through the centuries that they do quite well." Pet. App. 14a. That observation, however, is not helpful here. The essence of the materiality requirement is not a factual inquiry into what particular agency officials might do with accurate information. See *United States* v. *Hansen*, 772 F.2d 940, 950 (D.C. Cir. 1985) ("Application of § 1001 does not require judges to function as amateur sleuths, inquiring whether information specifically requested and unquestionably relevant to the department's or agency's charge would really be enough to alert a reasonably clever investigator that wrongdoing was afoot."), cert. denied, 475 U.S. 1045 (1986). Rather, materiality is determined by evaluating the relationship between the concealment or misrepresentation and the governmental process. See

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[30] Examples include preliminary questions concerning the admissibility of evidence and the competency of witnesses, see Fed. R. Evid. 104; and, in criminal cases, the voluntariness of confessions and the legality of searches and seizures, see *Crane* v. *Kentucky*, 476 U.S. 683, 688-689 (1986) (circumstances of confession are relevant to the "purely legal question" of voluntariness as well as to ultimate factual question of guilt or innocence); *Jackson* v. *Denno*, 378 U.S. 368, 391 & n.19 (1964) (judge or separate jury may determine voluntariness of confession); 1 W. LaFave & J. Israel, *Criminal Procedure* § 10.5, at 801 (1984) ("The legality of a search is a matter of law to be determined by the court and not the jury, and this is so even when resolution of the matter depends upon a determination of the credibility of various witnesses.") (footnote omitted); see also Fed. R. Crim. P. 12(b)(3).

ibid.; see also *United States* v. *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992). That evaluation is akin to determining the relevance of evidence, a legal determination that throughout history has been assigned to the court. *Sinclair*, 279 U.S. at 298.

2. The judgment that materiality presents a legal question is not simply an ancient maxim that has survived for want of reexamination. Rather, it was specifically reaffirmed by this Court in *Kungys*, which held that the issue of materiality presented "an issue of law, which we may decide for ourselves" without initial resolution by the trial court as finder of fact. 485 U.S. at 772. The court of appeals found *Kungys* inapposite because it concerned a civil proceeding (denaturalization) rather than a criminal proceeding. That distinction led the court to doubt that this Court in *Kungys* considered the "constitutional implications" of its decision for criminal cases. Pet. App. 10a, 14a. *Kungys* is highly germane to the present case, however. As Judge Kozinski explained, the classification of materiality as a question of law or a question of fact does not differ depending on whether the classification is made in a civil proceeding or a criminal one:

> Something is either a question of law or a question of fact; it can't be both. Once it is held to be a question of law—as materiality was in *Kungys*—certain consequences follow. One is that the standard of review is de novo rather than for substantial evidence. Another is that, in a criminal case, it need not be decided by a jury.

Id. at 28a-29a (dissenting opinion). That analysis underscores the relevance of *Kungys* here. *Kungys*

relied heavily on criminal cases, including those decided under Section 1001, in construing the cognate materiality requirement under the denaturalization statute. Accordingly, the Court's conclusion that materiality raises an issue of law lays to rest any suggestion that materiality under Section 1001 raises the sort of factual issue that is required, as a matter of fundamental fairness, to be determined by the jury as trier of fact in a criminal case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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